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NO.

Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1988

EDWARD G. JONES

Petitioner,

V.

THE CELOTEX CORPORATION and
AETNA CASUALTY & SURETY COMPANY

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Respectfully submitted,
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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit erred in dismissing petitioner's appeal for alleged lack of jurisdiction.

2. Whether petitioner's notice of appeal filed on July 16, 1987, two days **after** the district court's judgment notwithstanding the verdict was entered on July 14, 1987, constitutes a valid appeal from a final judgment under Acosta v. Louisiana Department of Health and Human Resources, 478 U.S. 251, 106 S. Ct. 2876, 92 L. Ed. 2d 192 (1986).

3. Whether the Fifth Circuit has failed to follow the mandate of the United States Supreme Court in numerous decisions such as Cohen, Gillespie, Banker's Trust, Foman and Acosta, infra, that practical and not technical construction of the principles of finality of judgments should govern to

prevent loss of the right to appeal, **not to facilitate** loss of the right to appeal.

4. Whether the order of the district court, entered on August 10, 1987, approximately three weeks after petitioner filed a notice of appeal, granting petitioner a pauper appeal, further certifying that petitioner's appeal was not frivolous and presented a substantial question, verifies that petitioner's appeal of July 16, 1987 was from a final judgment.

LIST OF PARTIES

Petitioner - Edward G. Jones - original plaintiff/appellant;

Respondents - The Celotex Corporation, a wholy owned subsidiary of the Jim Walter Corporation, and Aetna Casualty and Surety Company - original defendants/appellees;

Intervenor - Liberty Mutual Insurance Company - original intervenor/co-appellant

TABLE OF CONTENTS

Page

Questions Presented for Review . . . i

List of Parties. iii

Table of Contents. iv

Table of Authorities vii

Petition for Writ of Certiorari. . . 1

Relevant Opinions and Orders 6

Statutory Provisions 10

Jurisdiction 10

Statement of Proceedings and Dispositions 11

Argument and Authorities 15

Conflict in 5th Circuit. 30

Alternative Argument Regarding Motion for Leave to Secure Correction of Judgment from District Court 35

Conclusion 38

Appendix A-1

A. Minute Entry of July 8, 1987 entered on July 14, 1987. . . A-1

B. District Court Docket Sheet Excerpts. A-2

C. Petitioner's Notice of Appeal filed July 16, 1987 . . . . . A-3

D. Petitioner's Ex Parte Motion for Pauper Appeal filed July 26, 1987. . . . . A-5

E. Letter from the Clerk of the United States Court of Appeals, Fifth Circuit dated October 19, 1987. . . . . A-8

F. Judgment of District Court dated April 8, 1987, entered April 9, 1987. . . . . .A-10

G. Judgment of District Court dated October 30, 1987, entered November 2, 1987. . . . . .A-12

H. Opinion of the Fifth Circuit dated March 7, 1989 . . . . . .A-14

I. Opinion of the Fifth Circuit dated October 14, 1988. . . .A-18

STATUTES. A-28

J. Federal Rule of Appellate Procedure 4 . . . . . .A-28

K. Federal Rule of Civil Procedure 54. . . . . .A-34

L. Federal Rule of Civil Procedure 58. . . . . .A-37

M. Federal Rule of Civil Procedure 60. . . . . .A-39

N. Federal Rule of Civil Procedure 79. . . . . .A-43

O. 28 USC 1291 . . . . . .A-47

P. 28 USC 2101 . . . . . .A-48

TABLE OF AUTHORITIES

CASES: **Page**

Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949).....15

Gillespie v. United States Steel Corporation, 379 U.S. 148, 85 S. Ct. 308, 13 L. Ed. 2d 199 (1964).....16

Brown Shoe Company v. United States, 370 U.S. 294, 306, 82 S. Ct. 1502, 1513, 8 L. Ed. 2d 510 (1962).....17

Bronson v. La Crosse & M. Railroad Company, 2 Black 524, 531, 17 L. Ed. 347, 359.....17

Forgay v. Conrad, 6 How. 201, 203, 12 L. Ed. 404.....17

Dickerson v. Petroleum Conversion Corp., 338 U.S. 507, 511, 70 S. Ct. 322, 324, 94 L. Ed. 299 (1950).....17

Jetco Electronic Industries, Inc. v. Gardiner, 473 F. 2d 1228 (5th Cir., 1973).....17

Associated Press v. Taft-Ingalls Corporation, 323 F. 2d 114 (6th Cir., 1963).....21

Securities & Exchange Commission v. Jean R. Veditz Company, 22 F.R.D. 479, 482 (S.D.N.Y., 1958).....21

Banker's Trust Company v. Mallis, 435 U.S. 381, 98 S. Ct. 1117 (1978)....22

Foman v. Davis, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962).....24

Acosta v. Louisiana Department of Health & Human Resources, 478 U.S. 251, 106 S. Ct. 2876 92 L. Ed. 2d 192 (1986).....24

Beaudry Motor Company v. Abco Properties, Inc., 780 F. 2d 751 (9th Cir.,1986).....25

U.S. v. Price, 688 F. 2d 204 (3rd Cir., 1982).....26

Williams v. Town of Okoboji, 599 F. 2d 238 (8th Cir., 1979).....26

Yaretsky v. Blum, 592 F. 2d 65 (2nd Cir., 1979).....27

Bates v. Batte, 187 F. 2d 142 (5th Cir., 1951) cert. denied, 342 U.S. 815, 72 S. Ct. 29, 96 L. Ed. 616 (1951).....27

Woods v. Nicholas, 163 F. 2d 615 (10th Cir., 1947).....27

Erstling v. Southern Bell T & T Co., 255 F. 2d 93 (5th Cir., 1958).....27

Kirtland v. J. Ray McDermott & Co., 568 F. 2d 1166 (5th Cir., 1978).....27

Markham v. Holt, 369 F. 2d 940 (5th Cir., 1966).....28

Stokes v. Peyton's Inc., 508 F. 2d 1287 (5th Cir., 1975).....28

Budinich v. Becton Dickinson & Co., ____ U.S. ___, 108 S. Ct. 1717, 100 L. Ed. 178 (1988).....28

Nagle v. Lee, 807 F. 2d 435 (5th Cir., 1987).....31

U.S. v. Indrelunas, 411 U.S. 216, 93 S. Ct. 1562, 36 L. Ed. 2d 202 (1973).....32

Hanson v. Town of Flower Mound, 679 F. 2d 497 (5th Cir., 1982).....32

Sassoon v. U.S., 549 F. 2d 983 (5th Cir., 1977).....34

STATUTES: (Appendix J-O)

Federal Rule of Appellate Procedure 4

Federal Rule of Civil Procedure 54

Federal Rule of Civil Procedure 58

Federal Rule of Civil Procedure 60(a)

Federal Rule of Civil Procedure 79(a)

28 USC 1291

28 USC 2101

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

NO.

EDWARD G. JONES

PETITIONER,

v.

THE CELOTEX CORPORATION and
AETNA CASUALTY & SURETY COMPANY

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI

The petitioner respectfully requests that a writ of certiorari issue herein to review the opinions of the United States Court of Appeals for the Fifth Circuit. Those opinions concluded, inter alia, that because no notice of appeal was filed after a second but effectively identical judgment notwithstanding the verdict was entered, that the Fifth Circuit was

without jurisdiction. The appeals court failed to accept jurisdiction over petitioner's appeal filed two days after the first judgment notwithstanding a $670,000.00 jury verdict was entered by the clerk on July 14, 1987, holding that this entry did not constitute a final decision.

At no time did respondent, Celotex Corporation and Aetna Casualty & Surety Company, raise any objection to the petitioner's failure to in effect file a second notice of appeal after the district court rendered written reasons for its judgment notwithstanding the verdict, which had been previously entered by the Clerk on July 14, 1987.

The Fifth Circuit totally failed to give any credence whatsoever to the fact that the district court signed an order, approximately three weeks after

petitioner filed his notice of appeal on July 16, 1987, granting petitioner a pauper appeal, certifying in the pauper order that the appeal was not frivolous and presented a substantial question of law for the Fifth Circuit to consider. This pauper order and certification of the fact that the appeal was not frivolous and presented a substantial question of law was signed by the district court on August 6, 1987, and entered into the district court's docket on August 10, 1987.

Since a second notice of appeal was not filed after November 2, 1987, when a more formal judgment was entered by the clerk, the Fifth Circuit dismissed petitioner's appeal for lack of jurisdiction. The judgment of November 2, 1987, merely recites that the court having granted the motion for judgment

notwithstanding the verdict of Celotex and Aetna, therefore enters judgment in those parties' favor dismissing the complaint of the petitioner.

A mere review of exhibits A and G indicates that both documents effectively notify all counsel that the district court has granted the motion for judgment notwithstanding the verdict of Celotex and Aetna and that this judgment has been entered on July 16, 1987. Petitioner therefore properly appealed on July 16, 1987, and sought an order from the district court for a pauper order, which was entered on August 10, 1987 as the district court certified that the appeal was not frivolous but presented a substantial question.

When the court later entered judgment on November 2, 1987, petitioner

was already on appeal to the Fifth Circuit for the very same appeal of the judgment notwithstanding the verdict. Therefore, by the district court's own order, the appeal had been certified to be not frivolous and presenting a substantial question, and the Fifth Circuit had in effect accepted the appeal, corresponding to the district court for production of the record (appendix E).

The Fifth Circuit has therefore dismissed this appeal on the most technical of technicalities. In fact, the issue of the Fifth Circuit's jurisdiction was never raised by any party until oral argument on the merits conducted on August 2, 1988 in the Fifth Circuit. At no time did Celotex and Aetna ever complain of the Fifth Circuit not having jurisdiction.

Petitioner timely filed a petition or rehearing and a suggestion for rehearing en banc, which were denied by the Fifth Circuit Court of Appeals on March 7, 1989. It is therefore necessary for this court to issue a writ of certiorari, instructing the Fifth Circuit to accept jurisdiction of this case. Justice demands that petitioner be granted a hearing on the merits of the district court's judgment notwithstanding a $670,000.00 jury verdict, which now is a balance of well over one million dollars with interest as this suit was filed on February 1, 1985, over four years ago.

RELEVANT OPINIONS AND ORDERS BELOW

A) Excerpts of minute entry of July 8, 1987, received by counsel for petitioner as a **separate document,**

indicating that the motion of Celotex Corporation and Aetna Casualty & Surety Company for judgment notwithstanding the verdict or in the alternative for new trial was argued on July 8, 1987 and that the motion for judgment notwithstanding the verdict was granted on July 8, 1987 and entered on the docket sheet of the district court on July 14, 1987.

B) Excerpts from District Court docket sheet of July 8, 1987, indicating that a hearing was held on a motion by Celotex Corporation and Aetna for judgment notwithstanding the verdict or in the alternative for new trial and that the motion for judgment notwithstanding the verdict was granted and docketed on July 14, 1987.

C) Petitioner's notice of appeal filed on July 14, 1987 indicating that petitioner intended to appeal the judgment entered on July 14, 1987, that being the granting of judgment notwithstanding the verdict in favor of Celotex and Aetna.

D) Petitioner's ex parte motion for pauper appeal filed on July 26, 1987, with the order of the district court granting petitioner a pauper appeal further certifying that the appeal is not frivolous and presents a substantial question, said order dated August 6, 1987, and entered on August 10, 1987.

E) Letter from the clerk of the United States Court of Appeals, Fifth Circuit to the clerk of the United States District Court for the Eastern District of Louisiana

advising that the sixty (60) day discount period expired and that the court reporter would be required to discount her invoice by ten (10%) percent through November 3, 1987, and thereafter a twenty (20%) percent discount must be made.

F) Judgment of the district court approved by the presiding Judge dated April 8, 1987.

G) Judgment of thc district court approved by the presiding judge dated October 30, 1987.

H) Opinion of the Fifth Circuit dismissing petitioner's appeal dated October 14, 1988. Jones v. Celotex Corp. 857 F. 2d 273 (5th Cir., 1988).

I) Opinion of the Fifth Circuit denying petitioner's petition for rehearing and suggestion for rehearing en banc

dated March 7, 1989. Jones v. Celotex Corp. ____ F. 2d 2434 (5th Cir., 1989).

STATUTORY PROVISIONS - SEE APPENDIX

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit dismissing petitioner's appeal was entered on October 14, 1988. (appendix H). The Fifth Circuit later denied petitioner's petition for rehearing and suggestion for rehearing en banc by entry date of March 7, 1989. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 USC Section 1254(1). This writ of certiorari is timely under 28 USC 2101(c), if filed within ninety days of the denial of the petition for rehearing and/or suggestion for rehearing en banc, on or before June 5, 1989.

STATEMENT OF PROCEEDINGS AND DISPOSITION

Petitioner, Edward G. Jones, filed a damage suit based on diversity of citizenship under 28 USC 1333 on February 1, 1985. Jones obtained a $670,000.00 jury verdict on April 2, 1987, and a final judgment reflecting that verdict was approved by the court on April 8, 1987 and entered on April 9, 1987. Appellees filed a motion for judgment notwithstanding the verdict which the District Judge orally granted the motion **in open court** on July 8, 1987. The district court clearly ruled in the presence and clear understanding of counsel for all parties in open court in favor of Celotex and Aetna. An order reflecting the oral ruling was entered on July 14, 1987.

Petitioner received a **separate document** indicating that the motion was

argued on July 8, 1987, and that judgment notwithstanding the verdict was granted and entered on July 14, 1987. Jones thereafter filed a notice of appeal on July 16, 1987.

On August 6, 1987, the district court signed an order granting Jones a pauper appeal which certified that the appeal was not frivolous and presented a substantial question. At no time did the District Judge indicate its intention to issue another judgment and by signing the order of August 6, 1987, it certified that the appeal was not premature, as the District Judge gave petitioner Jones pauper standing further certifying that the appeal was not frivolous and presented a substantial question.

Approximately two months later, the clerk of the 5th Circuit wrote the clerk

of the district court advising that the record and trial transcript had not been received and that the court reporter would be required to discount her invoice by ten (10%) percent. After the transcript was finally completed, the district court unexpectedly issued written reasons for its previous judgment of July 8, 1987 and a second judgment form was approved by the district court after preparation by the clerk. That judgment states:

> The Court having granted defendant's motion for judgment notwithstanding the verdict, accordingly; (emphasis supplied)

Said judgment obviously refers to the previous judgment of July 8, 1987, which was entered on July 14, 1987, as this later judgment is dated October 30, 1987, and entered on November 2, 1987, almost four months after the court

orally advised the parties in open court that it would grant a judgment notwithstanding the verdict.

The 5th Circuit Court of Appeals, in a per curiam opinion, dismissed Jones' appeal, on October 14, 1988, after the parties had fully briefed and orally argued the merits of the case, for the reason that "the minute entry of the clerk dated July 14, 1987, did not constitute a final decision". Jones has filed a petition for panel rehearing and a suggestion for rehearing en banc, which both have been denied, and now brings this petition for writ of certiorari to the United States Supreme Court as the lower courts have inequitably deprived petitioner of his right to appeal the summary reversal of a jury verdict in his favor now worth in excess of one million dollars.

ARGUMENT AND AUTHORITIES

The United States Supreme Court has held that practical and not technical considerations are to govern the rules concerning the jurisdiction of the appellate courts under the basic principle that appeals are to be encouraged in a free, democratic society. In Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) the Supreme Court addressed the applicability of 28 U.S.C. 1291. The Court defined the purpose of the statute as to "disallow appeal from any decision which is tentative, informal or incomplete, as appeal gives the upper court a power of review, not one of intervention." supra, 69 S.Ct. 1225.

The Supreme Court further defined the meaning of a "final decision" in

Gillespie v. United States Steel Corporation, 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed. 2d 199 (1964), which construed the meaning of a final judgment or order under 28 U.S.C. 1291. The court held:

> Under 28 U.S.C. 1291 an appeal may be taken from any 'final' order of a District Court. But as this court often has pointed out, a final decision does not necessarily mean the last order possible to be made in a case. Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541, 545, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528. And our cases long have recognized that whether a ruling is 'final' within the meaning of Section 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality. Because of this difficulty this court has held that the requirement of finality is to be given a 'practical rather than a technical construction.' Cohen v. Beneficial Industrial Loan Corporation, supra, 337 U.S. at 546, 69 S.Ct., at 1226. See

> also Brown Shoe Company v. United States, 370 U.S. 294, 306, 82 S.Ct. 1502, 1513, 8 L.Ed. 2d 510 (1962); Bronson v. La Crosse & M. Railroad Company, 2 Black 524, 531, 17 L. Ed. 347, 359; Forgay v. Conrad, 6 How. 201, 203, 12 L.Ed. 404; Dickerson v. Petroleum Conversion Corp., 338 U.S. 507, 511, 70 S.Ct. 322, 324, 94 L.Ed. 299 (1950), pointed out that in deciding the question of finality the most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other'. Gillespie, supra, p. 311.

The Fifth Circuit adopted the Supreme Court rationale of "practical rather than technical" construction in Jetco Electronic Industries, Inc. v. Gardiner, 473 F. 2d 1228 (5th Cir., 1973), and stated that the issue is one of "substance over form" in its decision to follow the Supreme Court's command that practical, not technical considerations are to govern the

application of principles of finality. The most important competing considerations noted were "the inconvenience and cost of piecemeal review on the one hand and the danger of denying justice by delay on the other". 85 S.Ct. 311.

There is no equitable way for this Supreme Court of last resort to sanction the summary dismissal of petitioner's appeal by the Fifth Circuit as premature. The briefs on the merits have been filed and oral arguments have already been conducted in the Fifth Circuit.

The petitioner received a "separate document" which indicated that an order granting judgment notwithstanding a $670,000.00 unanimous jury verdict had been entered. The district judge further certified that Jones' appeal was

not frivolous but presented a substantial question for the Fifth Circuit to consider.

Without any prospect of further district court action (which occurred almost four months later), appellant had to take an appeal. Filing a second notice of appeal in November of 1987 would have had no practical effect on the substance of the appeal which all parties believed to be already pending in the Fifth Circuit. The last district court judgment was therefore a simple ministerial act of housekeeping which should have no effect on the merits of the petitioner's already pending appeal. The district court had clearly evidenced its intent to grant the judgment notwithstanding the verdict in open court which intent was confirmed by the separate document received by all

counsel herein after its entry on July 14, 1987.

Jetco, supra, is authority within the Fifth Circuit for the finality of the July 14, 1987 order indicating that the motion for judgment notwithstanding the verdict had been granted because that order "adjudicated the claims or the rights and liabilities of all of the parties". Id., p. 1231. Had the jury verdict cast additional defendants in judgment who had not moved for a judgment notwithstanding the verdict, the result would be different. The fact that the order appealed from was duplicated by another act of the trial court (which did not change or alter the effect of the original order) demonstrates the ultimate adjudication conferred by the July 14, 1987 minute entry of the district's court's order.

When the district clerk mails copies of a minute order to all counsel and that order's docket entry included the word "judgment", there is authority for the finality of the order for purposes of appeal. Associated Press v. Taft-Ingalls Corporation, 323 F. 2d 114 (6th Cir., 1963). "The touchstone is the understanding of the court, the parties and the clerk, as evidenced by their actions." Securities & Exchange Commission v. Jean R. Veditz Company, 22 F.R.D. 479, 482 (S.D.N.Y., 1958).

There was no misunderstanding between the parties and there was no objection raised by the respondent as to the finality of the July 14, 1987 minute order. The fact that the district judge signed an order allowing Jones a pauper appeal three weeks after the entry of the minute order certifying that the

appeal was not frivolous and presented a substantial question certainly indicates that the district court considered the appeal properly taken and not premature as the July 14, 1987 order was a final decision. Otherwise, the district judge would have rejected the pauper order as premature informing counsel to resubmit the request after entry of a "final decision".

The United States Supreme Court has held that a separate judgment document is not required to be filed before a decision is "final" for the purpose of appellate review. Banker's Trust Company v. Mallis, 435 U.S. 381, 98 S.Ct. 1117 (1978), rehearing denied 98 S.Ct. 2259. In Banker's, this Court held that "we nonetheless conclude that it could not have been intended that the separate-document requirement of Rule 58

be such a categorical imperative that the parties are not free to waive it." (p. 1119-1120). Banker's holds that:

> Certainty as to timeliness, however, is not advanced by holding that appellate jurisdiction does not exist absent a separate judgment. If, by error, a separate judgment is not filed before a party appeals, nothing but delay would flow from requiring the Court of Appeals to dismiss the appeal. Upon dismissal, the district court would simply file and enter the separate judgment, from which a timely appeal would then be taken. Wheels would spin for no practical purpose. 98 S. Ct. at 1120.

Banker's also referred to Moore, Federal Practice, in that:

> It must be remembered that the rule is designed to simplify and make certain the matter of appealability. It is not designed as a trap for the inexperienced...the rule should be interpreted **to prevent loss** of the right to appeal, **not to facilitate loss.** 9 J. Moore, Federal Practice Section 110.08(2), p. 120. n. 7(1970). 98 S.Ct. at 1121.

Banker's then cited Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed. 2d 222 (1962) as authority that:

> The same principles of common sense interpretation that led the court in Foman to conclude that the technical requirements for a notice of appeal were not mandatory where the notice 'did not mislead or prejudice' the appellee demonstrates that parties to an appeal may waive the separate-judgment requirements of Rule 58. 'It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for the decisions on the merits to be avoided on the basis of such mere technicalities.' 371 U.S., at 181, 83 S.Ct., at 230.

The recent United States Supreme Court decision in Acosta v. Louisiana Department of Health & Human Resources, 106 S.Ct. 2876 (1986) is directly on point as to the issue of prematurity of appeal. It holds that a notice of appeal filed **before** an order denying the appellant's motion to alter or amend a

judgment was entered on the docket, was premature and ineffective. Conversely, applied to the facts of this case, a notice of appeal filed **after** the order granting the appellee's motion was entered on the docket is therefore timely and effective.

There is obvious conflict among the circuits as to the separate document requirement relative to alleged permature appeals. In Beaudry Motor Company v. Abco Properties, Inc., 780 F. 2d 751 (9th Cir., 1986), the Ninth Circuit held that a docket entry indicating that motions were denied, a copy of which was sent to counsel, was "sufficient compliance" with Rule 58 and was in keeping with the purpose of the separate document requirement.

The purpose of the separate document requirement is to avoid the inequity

caused when a party is denied the opportunity to appeal because of a failure to recognize which of several documents or docket entries constitutes an entry of judgment.

Even if the notice of appeal is premature, where the appellees can demonstrate no prejudice resulting from premature filing, the appeal is considered properly noticed. U.S. v. Price, 688 F. 2d 204 (3rd Cir., 1982); Williams v. Town of Okoboji, 599 F. 2d 238 (8th Cir., 1979).

Although the filing of notice of appeal within the prescribed time limits is a jurisdictional prerequisite to appeal itself, courts should treat a premature appeal as from a judgment so as to avoid the denial of justice, expense and inconvenience in the absence of prejudice to appellees. Yaretsky v.

Blum, 592 F. 2d 65 (2nd Cir., 1979). Thus, the fact that a plaintiff appeals after a district judge gives his opinion but before judgment is filed is not such a substantial defect as to deprive the Court of Appeals of jurisdiction. Bates v. Batte, 187 F. 2d 142 (5th Cir., 1951), cert. denied, 342 U.S. 815, 72 S.Ct. 29, 96 L.Ed. 616 (1951). See also: Woods v. Nicholas, 163 F. 2d 615 (10th Cir., 1947) and Erstling v. Southern Bell T & T Co., 255 F. 2d 93 (5th Cir., 1958).

Most importantly, as is the case here, the provision of Rule 58 requiring that a judgment be set forth on a separate document may be satisfied by the district court after the appeal is docketed. Kirtland v. J. Ray McDermott & Co., 568 F. 2d 1166 (5th Cir., 1978). Kirtland also held that "the entry of

Rule 58 judgments is essentially ministerial in most cases. Id., p. 1169.

The Fifth Circuit has consistently adhered to the policy of exercising all proper means to prevent the loss of valuable rights when the validity of an appeal is challenged not because something was done too late, but rather because it was done too soon. When it is obvious that the overriding intent was effectively to appeal, and no prejudice will result to the appellee, the appellate court is justified in treating the appeal as from a final judgment. Markham v. Holt, 369 F. 2d 940 (5th Cir., 1966); Stokes v. Peyton's Inc., 508 F. 2d 1287 (5th Cir., 1975).

A recent Supreme Court decision, Budinich v. Becton Dickinson & Co., _ U.S. __, 108 S.Ct. 1717, 100 L.Ed. 178

(1988) defines "a final decision generally as one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. A question remaining to be decided after an order ending litigation on the merits does not prevent finality if its resolution will not alter the order or moot or revise decisions embodied in the order." 108 S.Ct. 1720.

It is clear that the most recent Supreme Court trend is to mandate immediate appeal under appellate rule 4 within thirty (30) days after entry of the order appealed from, or the right to appeal is lost. Petitioner Jones herein appealed from the entry of the order granting respondent's motion for JNOV two days **after** the order appealed from was entered. Therefore, petitioner's

appeal is timely under Acosta and Budinich, supra.

CONFLICT IN FIFTH CIRCUIT

Petitioner suggests that the decisions of the Fifth Circuit herein are in conflict with and contrary to the decisions of the United States Supreme Court in Cohen, Gillespie, Dickinson, Banker's Trust, Acosta and Budinich, supra. Furthermore, this Court's decision is in conflict with other Fifth Circuit opinions regarding the requisites of a "final decision" under 28 USC 1291 and the waiver of the separate document requirement under Federal Rule of Civil Procedure 58, particularly when the parties fail to raise the issue, as in Bates, Erstling, Kirtland and Beaudry, a Ninth Circuit opinion, supra.

Furthermore, a recent opinion clearly evidences the conflict existing within the Fifth Circuit on the issue of a "final judgment" and the application of Rule 58. Nagle v. Lee, 807 F. 2d 435 (5th Cir., 1987) held that the Fifth Circuit could take jurisdiction of an appeal despite the contention that there was no "final judgment", but only a minute entry, dismissing a suit. The Fifth Circuit, citing Banker's Trust, supra, ruled that the parties can waive the separate-document requirement where one has accidentally not been entered and reviewed other Fifth Circuit opinions accepting jurisdiction of an appeal from a "final decision" under Sec. 1291, even though no separate-judgment had been entered and the parties failed to raise that issue.

Nagle cites U.S. v. Indrelunas, 411 U.S. 216, 93 S.Ct. 1562, 36 L.Ed. 2d 202 (1973), a case which mechanically applied Rule 58 and was later modified by the Supreme Court decision in Banker's Trust, supra. There, the Supreme Court held that Rule 58 should be interpreted to prevent loss of the right of appeal, not to facilitate such a loss.

Nagle also cites Hanson v. Town of Flower Mound, 679 F. 2d 497 (5th Cir., 1982), which is also curiously cited by the Fifth Circuit herein as authority for dismissing Jones' appeal. Hanson held that because neither party to the appeal raised the failure to obtain entry of the judgment as a separate document, the Fifth Circuit had jurisdiction and could precede on the merits of the case. Hanson also held

that the Fifth Circuit was free to take jurisdiction of an appeal from a "final decision" under Section 1291, even though no separate judgment had been entered if the parties failed to raise that issue.

The entry of the order herein granting the judgment notwithstanding the verdict was an appealable final decision, and was accepted as such by the petitioner, Jones, the respondents, Celotex and Aetna, (who did not object or raise the issue of the separate document requirement), the district court (which granted Jones a pauper appeal certifying that the appeal was not frivolous and presented a substantial question), and the Fifth Circuit Court of Appeals clerk (who wrote to the district court reporter to

discount her invoice for tardiness of preparation of the record for appeal).

Hanson also cites Sassoon v. U.S., 549 F. 2d 983 (5th Cir., 1977), suggesting that "an exception might be made in a proper case", id., p. 985, further citing the authority relied on by the Supreme Court in Banker's Trust, supra. Petitioner suggests that, if necessary, this is a proper case in which to make an exception, as evidenced by the clear and uncontroverted fact that all of the parties to this proceeding firmly believed that petitioner Jones appealed a final decision **and** in view of the fact that appellees have never objected to the separate document requirement.

ALTERNATIVE ARGUMENT REGARDING MOTION FOR LEAVE TO SECURE CORRECTION OF JUDGMENT FROM DISTRICT COURT

Petitioner Jones also presents an alternative argument as he has filed motions in both the district court and the Fifth Circiut Court of Appeals for leave to correct all judgments of the district court. Defendant, William Walker, was not included in any of the district court judgments and for that reason Jones has filed the appropriate motions in the Fifth Circuit Court of Appeals for leave to secure correction of the district court judgment, which order was granted by the Fifth Circuit on December 23, 1988. The district court rendered a minute entry dated January 31, 1989, entered on February 1, 1989, refusing to correct its judgment as it held:

> When a party defendant is dismissed or abandoned by the plaintiff, then it is not necessary to mention such a party in the judgment for such a judgment to be considered final and appealable.

Respondent secured a formal order from the district court denying the motion for leave to secure correction of judgment which was signed on March 1, 1989, and entered on March 1, 1989. Respondent therefore appealled said order to the Fifth Circuit by the filing of a notice of appeal in the district court on March 9, 1989. This appeal is now still pending with the Fifth Circuit, and briefs have not yet been filed regarding the merits of same.

Respondent therefore suggests that this Supreme Court should, in the alternative, defer consideration and/or stay the pendency of respondent's writ of certiorari until the merits of the

now pending appeal in the Fifth Circuit are resolved, regarding the question of whether defendant, William Walker, should be included in the district court's judgment. If the Fifth Circuit reverses the district court, then the respondent can properly file a notice of appeal and the issue of the prematurity of respondent's initial appeal which has now been dismissed by the Fifth Circuit will become moot by the timely filing of a notice of appeal to the corrected judgment of the district court which would include all defendants, including William Walker, who has not heretofore been included in any of the district court's judgments. Respondent, Edward G. Jones, in the alternative,is also simultaneously filing a Motion To Defer Consideration with this Petition for Writ of Certiorari until such time as

the Fifth Circuit decides the merits of petitioner's remaining appeal, in the interest of judicial economy, in the event the need for this writ becomes moot.

CONCLUSION

This case requires the Supreme Court of the United States to issue a writ of certiorari to the Fifth Circuit Court of Appeals to reinstate this appeal as petitioner Jones has been inequitably deprived of the right to have his appeal decided on its merits. The Fifth Circuit has applied technical and not practical considerations of the principles of finality of judgments. Numerous Supreme Court decisions require the application of substance over form in interpreting the law to prevent loss of the right to appeal, not to facilitate loss of the right to appeal.

The obvious mandate of Cohen, Gillespie, Banker's Trust, Foman, Acosta and Budinich require that this Supreme Court accept jurisdiction over the merits of petitioner's appeal, primarily in view of the fact that respondents, (Celotex and Aetna) never objected to the lack of a separate judgment document required by Rule 58. As was stated in Banker's Trust:

> It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for the decision on the merits to be avoided on the basis of such mere technicalities. 371 U.S. 181, 83 S.Ct. 230.

Also, the Fifth Circuit's per curiam decision is contrary and in direct conflict with Acosta, supra, when applied to this case, as it holds that a notice of appeal filed after the order granting the appellee's motion was

entered on the docket is timely and effecitve.

There is no question that Jones' notice of appeal was filed two days after the order granting judgment notwithstanding the verdict was entered. Three weeks later, the district judge confirmed that its order granting judgment notwithstanding the verdict was final when it signed an order granting petitioner Jones a pauper appeal, further certifying that the appeal was not frivolous and presented a substantial question.

Respondents, Celotex and Aetna, have never raised an objection to the appeal brought by Jones until after the Fifth Circuit Court of Appeals raised the question of finality during oral argument on the merits. Therefore **all** parties to this proceeding, until oral

argument, firmly believed that Jones had timely appealled a final decision. These parties include respondents, Celotex and Aetna, the intervenor, Liberty Mutual, the district court judge, and the clerks of both the district and appellate courts.

Since the Supreme Court has on numerous occasions clearly directed the appellate courts to use practical and not technical construction of the principles of finality to prevent loss of the right to appeal, not to facilitate loss, Jones suggests that it is necessary for this Supreme Court to issue a writ of certiorari in this matter due to the obvious conflict of the Fifth Circiurt's per curiam opinions with the clear and equitable reasoning of the United States Supreme Court in the aforementioned cases.

Furthermore, the Fifth Circuit per curiam opinion is in direct conflict with other Fifth Circuit cases such as Bates, Erstling, Kirtland, Markham and Stokes, which clearly mandate that the Federal Courts should "exercise all proper means to prevent the loss of valuable rights when the validity of an appeal is challenged not because something was done too late, but rather because it was done too soon". Stokes, supra, p. 508. Where the overriding intent was effectively to appeal, and no prejudice will result to the appellee, we are justified in treating the appeal as from a final judgment. Markham, p. 942.

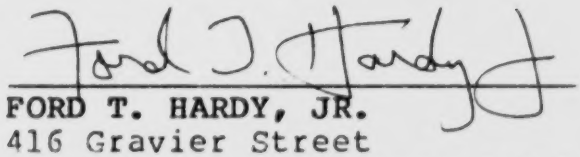
The Fifth Circuit's per curiam opinion is incorrect and in direct conflict with oth r Fifth Circuit cases and numerous Supreme Court cases cited

herein. Furthermore, these holdings are in direct conflict with the facts of this case as the district court judge certified three weeks after Jones filed notice of appeal that Jones was entitled to a pauper appeal because the appeal was not frivolous but presented a substantial question. Obviously, that substantial question is whether the district court was correct in granting a judgment notwithstanding a $670,000.00 jury verdict on July 8, 1987.

Petitioner, Edward G. Jones, prays that this court issue a writ of certiorari herein directing the Fifth Circuit to accept jurisdiction of this appeal as petitioner has been unjustly

deprived of a decision on the merits based on mere technicalities.

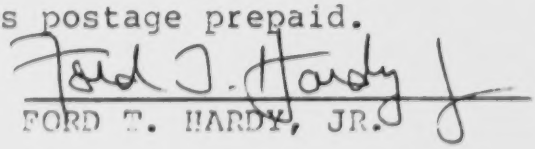
RESPECTFULLY SUBMITTED:



FORD T. HARDY, JR.
416 Gravier Street
New Orleans, Louisiana 70130
(504) 561-0514
Attorney for Appellant
La. Bar #6546

CERTIFICATE OF SERVICE

Undersigned counsel for petitioner hereby certifies that he has on the 1st day of June, 1989, served a copy of the foregoing petition for writ of certiorari on counsel for all parties to this proceeding, including Mr. Pene Pastorek, attorney for respondents, and Ms. Kathleen Hill, attorney for interventor, by mailing the same by United States Mail, properly addressed, and first class postage prepaid.



FORD T. HARDY, JR.

APPENDIX A

JULY 8, 1987

85-491

EDWARD G. JONES VS. THE CELOTEX CORPORATION, ET AL

MOTION OF CELOTEX CORPORATION AND AETNA CASUALTY & SURETY CO. FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE FOR NEW TRIAL.

ARGUED. MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT GRANTED.

Appearances: Ford Hardy - Plaintiff
Rene Pastorek - Defendants

Courtroom Deputy-Pam Polk
Court Reporter - Pat Duroncelet

DATE OF ENTRY July 14, 1987

APPENDIX B

CIVIL DOCKET CONTINUATION SHEET

DATE	NR	PROCEEDINGS
7/8/87	88	Hrg on mtn by Celotex Corp & Atena for judg notwithstanding the verdict or in the alternative for new trial - mtn for judg notwithstanding verdict GRANTED. (RFC) dktd 7/14/87.
7/16/87	89	Pltf's ntc of appeal from amended judg entered 7/14/87.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

EDWARD G. JONES	*	CIVIL ACTION
VERSUS	*	NO. 85-491
THE CELOTEX CORPORATION, et al.	*	SECTION "C"
* * * * *	*	MAG. DIV. 5

NOTICE OF APPEAL

Notice is hereby given that Edward G. Jones, Plaintiff in the above-captioned matter, hereby appeals to the United States Court of Appeal for the Fifth Circuit from the Amended Judgment entered in this action on the 14th day of July, 1987.

New Orleans, Louisiana, this 16th day of July, 1987.

RESPECTFULLY SUBMITTED:

/s/ FORD T. HARDY, JR.
FORD T. HARDY, JR.
416 Gravier Street
New Orleans, Louisiana 70130
(504) 561-0514
Attorney for Plaintiff
La. Bar #6546

/s/ RICHARD M. MARTIN, JR.
JOHN J. CUMMINGS, III
RICHARD M. MARTIN, JR.
Cummings, Cummings & Dudenhefer
416 Gravier Street
New Orleans, Louisiana 70130
(504) 586-0000
Attorneys for Plaintiff

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

EDWARD G. JONES	*	CIVIL ACTION
VERSUS	*	NO. 85-491
THE CELOETEX CORPORATION, et al.	*	SECTION "C"
* * * * *	*	MAG. DIV. 5

EX PARTE MOTION FOR PAUPER APPEAL

NOW INTO COURT, through undersigned counsel, comes plaintiff, Edward Gregory Jones, who upon suggesting to this court that he has filed a notice of appeal herein on July 16, 1987, that plaintiff has prosecuted this matter as a pauper, by order of this court dated February 1, 1985, that he still lacks sufficient means to pay for the cost of the transcript herein on appeal, therefore moves this court for an order granting plaintiff pauper standing on his appeal, thereby to have the transcript prepared

in this matter at government expense, and for all other general and equitable relief as the law and the facts may warrant and that the appeal is not frivolous but presents a substantial question.

RESPECTFULLY SUBMITTED:

/s/ FORD T. HARDY, JR.

FORD T. HARDY, JR.
416 Gravier Street
New Orleans, Louisiana 70130
(504) 561-0514
Attorney for Plaintiff
La. Bar #6546

DATE OF ENTRY AUG 10 1987

ORDER

Considering the foregoing ex parte motion for pauper appeal;

IT IS HEREBY ORDERED that plaintiff, Edward G. Jones, be hereby granted a pauper appeal, thereby further ordering that the transcript of all testimony in this matter be prepared and forwarded to the 5th Circuit Court of Appeals, at government expense, as that the appeal is not frivolous and presents a substantial question.

New Orleans, Louisiana, this 6th day of August, 1987.

/s/ JUDGE ROBERT F. COLLINS

APPENDIX E

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

October 19, 1987

Mrs. Loretta G. Whyte, Clerk
United States District Court
500 Camp Street
Room C-151
New Orleans, LA 70130

No. 87-3515 - Jones, Et Al. v. The Celotex Corporation, Et Al.

(USDC No. CA-85-491-C (5))

Dear Mrs. Whyte:

In this case, the 60 day discount period expired on October 4, 1987 and, to this date, the transcript has not been filed. Therefore, I am advising you that the court reporter will be required to discount her invoice by 10%. If the transcript is not filed by

November 3, 1987, a 20% discount must be made.

I am writing to you because the case is proceeding in forma pauperis with the transcript to be paid at the expnse of the United States.

Sincerely,

/s/ GILBERT F. GANUCHEAU

Gilbert F. Ganucheau
Clerk

GFG/jmg
cc: Mr. Ford T. Hardy, Jr.
Ms. Kathleen W. Will
Mr. Rene A. Pastorek
Ms. Patricia Duroncelet

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

EDWARD G. JONES	CIVIL ACTION
VERSUS	NO. 85-491
THE CELOETEX CORPORATION, et al.	SECTION "C"(5)

* * * * * * * * * *

JUDGMENT

The jury having duly rendered its verdict, accordingly;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Edward G. Jones, and against The Celotex Corporation and Aetna Casualty and Surety Company, in the amount of $670,000.00 with interest at the legal rate from date of judicial demand and costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant, Salvage One

Demolition Co., be hereby dismissed with prejudice for failure to prosecute.

New Orleans, Louisiana, this 8th day of April, 1987.

/s/ Loretta G. Whyte
Clerk

Approved as to form:

/s/ JUDGE ROBERT F. COLLINS

DATE OF ENTRY APR 9 1987

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

EDWARD G. JONES	CIVIL ACTION
VERSUS	NO. 85-0491
THE CELOETEX CORPORATION, et al.	SECTION "C"(5)

* * * * * * * * *

J U D G M E N T

The Court having granted defendant's motion for judgment notwithstanding the verdict, accordingly;

IT IS ORDERED, ADJUDGED and DECREED that there be Judgment in favor of defendants, Celotex Corporation, and Aetna Casualty and Surety Company, and against plaintiff, Edward G. Jones, dismissing the complaint with prejudice, with each party bearing their own costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Salvage One Demolition Co.

by dismissed with prejudice for failure to prosecute.

New Orleans, Louisiana, this 30th day of October, 1987.

/s/ Loretta G. Whyet
Clerk

APPROVED AS TO FORM:

/s/ JUDGE ROBERT F. COLLINS

DATE OF ENTRY NOV 2 1987

APPENDIX H

Edward G. JONES, Plaintiff-Appellant,

and

Liberty Mutual Insurance Company, Intervenor-Appellant,

v.

The CELOTEX CORPORATION, A Wholly Owned SUBSIDIARY OF THE JIM WALTER CORPORATION, and Aetna Casualty and Surety Company, Defendants-Appellees.

No. 87-3515,

United States Court of Appeals,

Fifth Circuit.

March 7, 1989.

Appeal from the United States District Court for the Eastern District of Louisiana.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion October 14, 5th Cir., 1988, 857 F.2d 273)

Before CLARK, Chief Judge, GARZA and POLITZ, Circuit Judges.

PER CURIAM:

Following publication of our original opinion in this case, we granted Jones' motion for leave to secure correction of judgment in the district court. In the district court Jones sought to have the October 30, 1987 judgment corrected on the grounds that it did not mention one of the defendants in this case, William Walker. The district court refused to correct its judgment, finding that Jones had abandoned the claim against William Walker.

[1,2] The subsequent action by the district court does not render the October 30, 1987 judgment non-final. An order that effectively ends the litigation on the merits is an

appealable final judgment even if the district court does not formally include judgment on a claim that has been abandoned. Baltimore Orioles, Inc., v. Major League Baseball Players Ass'n., 805 F.2d 663, 667 (7th Cir.1986), cert. denied, 480 U.S. 941, 107 S.Ct. 1593, 94 L.Ed.2d 782 (1987). Since there was no notice of appeal following the October 30, 1987 final judgment, our opinion properly dismissed the case for lack of jurisdiction.

We note that the dismissal does not result in inequity to Jones. The facts in the record plainly support the judgment notwithstanding the verdict. Absent the jurisdictional defect, the judgment surely would have been affirmed.

In all other respects, the petition for rehearing is denied and no member of

this panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the suggestion for Rehearing En Banc is DENIED.

APPENDIX I

Edward G. JONES, Plaintiff-Appellant,

and

Liberty Mutual Insurance Company, Intervenor-Appellant,

v.

The CELOTEX CORPORATION, A Wholly Owned SUBSIDIARY OF THE JIM WALTER CORPORATION, and Aetna Casualty and Surety Company, Defendants-Appellees.

No. 87-3515,

United States Court of Appeals,

Fifth Circuit.

Oct. 14, 1988.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before CLARK, Chief Judge, GARZA and POLITZ, Circuit Judges.

PER CURIAM:

Edward G. Jones attempts to appeal the judgment notwithstanding the verdict granted by the district court. Because no notice of appeal was filed after judgment was entered this court is without jurisdiction.

I.

Appellee Celotex Corporation is the owner and operator of a manufacturing plant located in Louisiana. Appellant Jones was an employee of Salvage One Demolition Co. a/k/a Southern States Demolition Co. ("Salvage One"). Salvage One contracted with Celotex to demolish certain buildings at the plant. During the demolition of one of the buildings, Jones was injured when the part of the structure on which he was working collapsed. At trial, appellant attempted to show that Celotex controlled the method and means by which

Salvage One performed its job. Celotex, on the other hand, produced evidence to prove that Salvage One carried out its function as an independent contractor and made all material decisions as to how the buildings would be demolished. The jury found Celotex to be negligent and awarded damages of $670,000.00 to Jones. The district court adopted the verdict of the jury and entered judgment on April 9, 1987.

Celotex moved for a judgment notwithstanding the verdict or in the alternative for a new trial. The district court held a hearing on the motion on July 8, 1987. At the hearing, the district court orally granted the motion for judgment notwithstanding the verdict and advised that he would provide his written opinion later. On that same date, the district court clerk

made the following minute about the hearing: "Motion of Celotex Corporation and Aetna Casualty and Surety Company for Judgment Notwithstanding the Verdict or in the Alternative for New Trial. Argued. Motion for Judgment Notwithstanding Verdict Granted." The clerk entered this minute entry on the docket on July 14, 1988 with the following notation: "Hrg on mtn by Celotex Corporation & Aetna for judg notwithstanding the verdict or in the alternative for new trial-mtn for judg notwithstanding verdict GRANTED." On July 16, 1987, Jones filed a notice of appeal "from the Amended Judgment entered in this action on the 14th day of July, 1987."

On October 30, 1987 the district court issued a written opinion granting the motion for judgment notwithstanding

the verdict. 683 F. Supp. 555. On that same date, the clerk prepared and signed a separate document entitled "Judgment." This document was approved as to form by the district court, and entered on the docket on November 2, 1987. Jones did not file a notice of appeal after judgment was entered.

II.

We raise the question of our own jurisdiction sua sponte. Under 28 USC Section 1291, "[t]he courts of appeals ... have jurisdiction of appeals from all final decisions of the district courts of the United States." Federal Rule of Appellate Procedure 4(a)(4) prescribes the timing for an appeal from a judgment notwithstanding the verdict:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by a party: (i) for judgment under Rule 50(b); ... the time

> for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any such other motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above.

[1,2] The time within which a notice of appeal must be filed begins to run on the date of entry of a judgment. A judgment is not entered within the meaning of Fed.R.App.P. 4(a)(4) unless it is entered in compliance with Federal Rules of Civil Procedure 58 and 79(a). Fed.R.App.P. 4(a)(6). Rule 58 requires that every judgment be set forth in a separate document,[1] and Rule 79(a)

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[1] Federal Rules of Civil Procedure 58 provides in part:

> [U]pon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the

requries the district court clerk to enter the judgment in the docket.[2] In

---

> clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court.... Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a).

[2] Federal Rules of Civil Procedure 79(a) provides in part:

> The clerk ... shall enter [in the civil docket] each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers.... All papers filed with the clerk, ... all appearances, orders, verdicts, and judgments shall be entered chronoligically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court.... The entry of an order or judgment shall show the date the entry is made.

this case, no separate judgment was set forth as required by Fed.R.Civ.P. 58 until October 30, and no entry was made in accordance with Fed.R.Civ.P. 79(a) until November 2. A notice of appeal in ineffective unless filed after entry of judgment on a motion for judgment notwithstanding the verdict. Fed.R.App.P. 4(a)(4); Acosta v. Louisiana Dep't of Health and Human Resources, 478 U.S. 251, 106 S.Ct. 2876, 92 L.Ed. 2d 192 (1986).

[3,4] We have held that we may take jurisdiction of an appeal from a "final decision" under Section 1291, even though no separate judgment has been entered, when the parties fail to raise the issue. Hanson v. Town of Flower Mound, 679 F.2d 497 (5th Cir., 1982). However, the parties cannot waive the separate document rule of Fed.R.Civ.P.

58 if there has been no "final decision." The minute entry of the clerk dated July 14, 1987, did not constitute a "final decision." This court succinctly stated the law in Pure Oil Co. v. Boyne, 370 F.2d 121 (5th Cir., 1966):

> The only act on the part of the court was oral, and the only written evidence of such action was the minute entry of the clerk. Even prior to the added requirement of Rule 58, this minute entry alone could not stand as a final judgment of the district court. (Courts render judgment; clerks only enter them on court records.)

Id. at 123 (quoting Burke v. Comm'r of Internal Revenue, 301 F. 2d 903 (1st Cir., 1962)). See also Wood v. Coast Frame Supply, Inc., 779 F.2d 1441 (9th Cir.), amended 791 F.2d 802 (1986).

III.

Final judgment was not entered in this case until November 2, 1987. Since

no appeal was filed after that date, we lack jurisdiction. Accordingly, the appeal is

DISMISSED.

APPENDIX J - Statutes

RULE 4. Appeal as of Right-When Taken

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it

shall be deemed filed in the district court on the date so noted.

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or

make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not

later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

(b) Appeals in Criminal Cases. In a criminal case the notice of appeal by a

defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment. When an appeal by the government is authorized

by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the disctrict court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

As amended Apr. 30, 1979, eff. Aug. 1, 1979.

APPENDIX K

Rule 54. Judgments; Costs

(a) Definition; form

"Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment upon multiple claims or involving multiple parties

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express

direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is

rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

(As amended Mar. 2, 1987, eff. Aug. 1, 1987.)

APPENDIX L

Rule 58. Entry of Judgment

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in

Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.)

APPENDIX M

Rule 60. Relief from Judgment or Order

(a) Clerical mistakes

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of any appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal

representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of judgment. The motion shall be made within a reasonable time, and

for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., Section 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(As amended Mar. 2, 1987, eff. Aug. 1, 1987.)

APPENDIX N

Rule 79. Books and Records Kept by the Clerk and Entries Therein

(a) Civil Docket. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronoloigcally in the civil

docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

(b) Civil Judgments and Orders. The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States may prescribe, a correct copy of every

final judgment or appealable order, or order affecting title to or lien upon real or personal property, and any other order which the court may direct to be kept.

(c) Indices; Calendars. Suitable indices of the civil docket and of every civil judgment and order referred to in subdivision (b) of this rule shall be kept by the clerk under the direction of the court. There shall be prepared under the direction of the court calendars of all actions ready for trial, which shall distinguish "jury actions" from "court actions."

(d) Other Books and Records of the Clerk. The clerk shall also keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts, with the

approval of the Judicial Conference of the United States.

As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Jan. 21, 1963, eff. July 1, 1963.

APPENDIX O

28 U.S.C. Section 1291. Final decisions of district courts.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, The United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

(As amended Apr. 2, 1982, Pub.L. 97-164, Title I, Section 124, 96 Stats. 36.)

APPENDIX P

28 U.S.C. Section 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from

the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a

case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his

application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

(June 25, 1948, c. 646 Stat. 961; May 24, 1949, c. 139, Section 106, 63 Stat. 104.)

(g) The time for application for a writ of certiorari to review a decision of the United States Court of Military Appeals shall be as prescribed by rules of the Supreme Court.

(As amended Pub.L. 98-209, Section 10(b), Dec. 6, 1983, 97 Stat. 1406.)